



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Gentex Corporation

**File:** B-233119

**Date:** February 13, 1989

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### **DIGEST**

Sole source award on urgency grounds limited to only known firm capable of providing currently needed safety item and limited to urgently needed quantity is unobjectionable.

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### **DECISION**

Gentex Corporation protests the noncompetitive award of delivery order No. GB01 to Scott Aviation by the Department of the Navy under Air Force basic ordering agreement (BOA) No. F040606-89-G-0032 for the acquisition of a quantity of laser eye protection visors. Gentex argues that the award constitutes an improper sole-source award.

We deny the protest.

In 1987, the Navy issued request for proposals (RFP) No. N62269-87-R-0215 to obtain laser protective devices (LPDs) for its airborne personnel. The devices are designed to protect air crew members from the threat of exposure to potentially eye damaging lasers. The RFP called for the production of "off the shelf" LPDs in small quantities for testing purposes and included an option for the acquisition of up to 5,000 additional units. The RFP sought protection at 2 and preferably 3 wavelengths of laser radiation. The RFP further stated that wavelength protection, if submitted, would be considered as part of the criteria for evaluation and award.

Gentex, Scott and five other firms submitted offers. After the evaluation of offers, the Navy returned Gentex's proposal without making award or conducting discussions. In a letter dated July 7, 1987, and received by Gentex two days later, the Navy stated that the Gentex LPDs would be "... available to the Navy from the Air Force as they are provided under other contracts." The letter also stated

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that Gentex could request a debriefing. A sample of the Gentex and another offeror's LPD were obtained from the Air Force. Of the remaining five firms, four were awarded contracts under which the Navy acquired LPD samples.

The Navy subjected the sample LPDs to extensive testing to determine whether they conformed to the Navy specification requirements. Specifically, the Navy evaluated the LPDs to determine compliance with the specifications for protection at 3 wavelengths and for use during daytime and/or nighttime flight operations.

Concurrent with the Navy's efforts, the Air Force was engaged in a similar acquisition. Gentex had provided LPDs to the Air Force and it was one of these LPDs which was furnished to the Navy for testing purposes. However, the Navy was unaware that the Gentex LPDs which had been sold to the Air Force (one of which the Navy tested) were manufactured to substantially different specifications; the critical wavelengths were different from those of the Navy. For example, the Air Force had relaxed its specifications for a critical wavelength requirement. Consequently, when the Navy tested the Gentex sample visor, it failed in certain critical respects. Many of the other firms' LPDs also failed the Navy testing and Scott's device was found to be the only product meeting the Navy's needs.<sup>1/</sup>

While testing was conducted, the Navy bought protective spectacles to meet its immediate needs until a visor procurement could be completed. However, spectacles provide more limited protection and by May of 1988, the Navy identified need for 2,737 LPDs which provided more complete multiwavelength protection. Accordingly, sometime during June or July of 1988, the cognizant procurement activity was directed to acquire the above mentioned quantity of LPDs

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<sup>1/</sup> The Navy testing showed that, of the LPDs tested only the Scott device offered adequate protection at four laser wavelengths. Another firm's product, while providing greater luminous transmittance (thus making it superior for nighttime use) was only suitable for protection at two laser wavelengths.

from Scott. During July or August, the contracting officer decided to fulfill the requirement using a basic ordering agreement (BOA) which existed between the Air Force and Scott.<sup>2/</sup>

On September 29, order No. GB01 was executed by the Navy for the sole-source acquisition from Scott. However, the order was not placed before the expiration of the Scott BOA for fiscal year 1988. Gentex on October 7, filed the instant protest and also on October 11 submitted an unsolicited offer to the Navy for the supply of the LPDs which were to be acquired from Scott. Gentex asserted it could expedite delivery of samples and of production quantities. The Navy, upon receipt of the unsolicited Gentex proposal, forwarded it to its technical personnel for evaluation.

After initial review of the unsolicited Gentex proposal, the Navy held meetings with representatives of Gentex in order to clarify the proposal and to make arrangements for Gentex to furnish samples to the Navy for testing and evaluation purposes. For example, the Navy was concerned that while Gentex's proposal offered wavelength protection at 5 different levels, its offer did not identify the protective capacity available at these levels. However, given the Navy's critical need for visors as soon as possible, on November 8, the Navy placed a sole-source delivery order with Scott under the new Air Force BOA for one half of the quantity originally contemplated under the earlier delivery order and a 100 percent option for the remaining quantity. The terms of the delivery order require Scott to furnish first articles to the Navy within 150 days after award or sooner and calls for the delivery of production quantities 60 to 120 days after first article approval. The option contained in the delivery order is exercisable up to 180 days after award. This sole-source acquisition was based on the Navy's findings of "unusual and compelling urgency." The contracting officer concluded that the initial buy should go forward because the Navy needed a contract in place in the event Gentex's samples failed testing and approval of Gentex's product was delayed. The contracting officer concluded that, given the lead times necessary for first article testing and performance under the Scott order, postponing the order pending evaluation of Gentex's product could cause considerable delay in meeting the agency's urgent needs and posed an unacceptable risk.

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<sup>2/</sup> The record is unclear as to why it took three months to develop an acquisition strategy once the requirement had been identified.

The protester, in its initial letter of protest, argued that the delivery order dated September 29 constituted an improper sole source procurement. Subsequent to Gentex's original filing, however, the Navy took the actions described above, namely, it acquired samples of the Gentex product for testing and evaluation and halved the basic quantity of LPDs to be acquired under the subsequently issued November 8 delivery order to permit a competition for the remaining quantity. In its comments to our Office, Gentex alleges that, because the 1987 evaluation of its product was improper (i.e. the evaluation was performed upon a differently designed product), the subsequent sole-source delivery order is also improper and should be terminated. According to Gentex, the Navy should evaluate its product and compete the entire quantity. Gentex further argues that the delivery order issued to Scott is not justifiable on an urgency basis pursuant to 10 U.S.C. § 2304(c)(2) (Supp. IV 1986). Gentex argues that the Navy spent approximately six months placing the order with Scott and that the order, by its terms, contains an unreasonably long delivery schedule. In this latter respect, Gentex points out that the delivery schedule which it submitted with its unsolicited proposal shows that the firm could meet all of the Navy's needs within 15 to 45 days.

In its response, the Navy states that at the time it evaluated the Gentex Air Force sample it was unaware of the differences between the Air Force and Navy specifications. The Navy goes on to argue that any allegation regarding its conduct of the 1987 procurement is untimely because Gentex did not seek a debriefing or protest the rejection of its proposal under the 1987 procurement. The Navy also argues that, regardless of its error in 1987, it has now remedied the problem by acquiring Gentex samples which it is presently evaluating.

As to the sole-source delivery order which was issued to Scott, the Navy argues that it is properly justified on urgency grounds pursuant to 10 U.S.C. § 2304(c)(2) (Supp. IV 1986). In particular, the Navy states that the LPDs are needed to meet a critical existing threat to combat units which are now deployed and that under the circumstances, placing an order with Scott is the only practicable, low risk way to meet its needs at this time since Gentex's samples must undergo extensive testing without assurance the samples will pass the tests. In this connection, the Navy argues that placing a delivery order with Scott for one half of the original quantity with an option for the remaining quantity is the only reasonable course for it to have taken even though it is currently evaluating the Gentex product; were it not to have done this, the Navy argues, it could

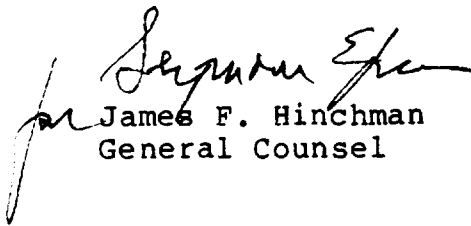
find itself in a position of having delayed the procurement still longer in order to evaluate the Gentex LPDs only to find at the end of that time that the Scott LPDs were still the only acceptable alternative. According to the Navy, the structure of the current delivery order allows it to acquire urgently needed LPDs and at the same time allows for a competitive acquisition of the remaining quantity should the Gentex LPDs prove satisfactory.

Under the Competition in Contracting Act of 1984 (CICA), an agency may use other than competitive procedures to procure goods or services where the agency's requirements are of such an unusual and compelling urgency that the government would be seriously injured if the agency were not permitted to limit the number of sources from which it seeks bids or proposals. 10 U.S.C. § 2304(c)(2) (Supp. IV 1986). This authority is limited by the requirement of 10 U.S.C. § 2304(e) that agencies seek offers from as many potential sources as is practicable under the circumstances. An agency, however, has the authority under 10 U.S.C. § 2304(c)(2) to limit the procurement to the only firm it reasonably believes can properly perform the work in the available time. Support Systems Associates, Inc., B-232473, et al., January 5, 1989, 89-1 CPD ¶ \_\_\_\_. We will object to the agency's determination to limit competition based upon unusual and compelling urgency only where we find that the agency's decision lacks a reasonable basis. Dynamic Instruments, Inc., B-220092, et al., Nov. 25, 1985, 85-2 CPD ¶ 596.

We conclude that the sole-source award of delivery order No. GB01 to Scott was reasonable. As noted above, the Navy has a current critical demand for LPDs to safeguard airborne personnel engaged in active duty who are presently being exposed to potentially hazardous laser radiation. At the time the award was made, the Navy was aware of only one firm--Scott--capable of manufacturing the LPDs in accordance with its requirements and was in receipt of an unsolicited proposal from a manufacturer whose product had not been approved. The record shows that the agency was not aware at the time it conducted its initial testing in 1987 that Gentex's Air Force visor would not meet its specifications. In fact, until it was discovered in the course of this protest by the Navy, the agency did not know that the tests were on nonconforming samples. The actions of the Navy under these circumstances were, in our opinion, reasonable; it made an award for a limited quantity together with an option for an additional quantity and at the same time began a diligent effort to approve the Gentex product. We think that the Navy has made a reasonable effort to both enhance competition and at the same time ensure delivery of a

critically needed product under the only delivery schedule available from an approved source. Further, we note that the fact that Gentex offered a more accelerated delivery schedule was considered by the Navy, but the Navy concluded that awaiting testing of the Gentex product before making any award posed an unacceptable risk because it would further delay the Navy's acquisition of LPDs should the Gentex product prove unsatisfactory. Consequently, we have no reason to object to the Navy's actions in awarding the delivery order to Scott.

The protest is denied.

  
James F. Hinchman  
General Counsel